

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
RACINE EDUCATION ASSOCIATION  
Complainant,  
vs.  
UNIFIED SCHOOL DISTRICT NO. 1  
OF RACINE COUNTY, WISCONSIN  
Respondent.

Case XVIII  
No. 16996 MP-169  
Decision No. 11315-D

ORDER AMENDING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner George R. Fleischli, having on January 9, 1974 issued Findings of Fact, Conclusions of Law and Order in the above entitled matter, and the Respondent having filed a petition for review in the matter, and the parties having filed briefs with respect to said petition for review; and the Commission, having reviewed the Examiner's Findings of Fact, Conclusions of Law and Order, the petition for review, and the briefs of the parties, being satisfied that the Findings of Fact and Conclusions of Law made by the Examiner be amended, and that the Order issued by the Examiner be affirmed;

NOW, THEREFORE, it is

ORDERED

1. That paragraph 11 of the Examiner's Findings of Fact be amended to read as follows:

11. That subsequently on or about November 13, 1972, the Complainant and Respondent entered into a new collective bargaining agreement which was retroactive in its application to August 25, 1972, and contained the same grievance procedure and planning time provision as was contained in the prior collective bargaining agreement and included all those working conditions which were contained in the prior collective bargaining agreement but were omitted from the resolution adopted by the Respondent's Board of Education on September 11, 1972, and that said agreement contained among its provisions the following:

"12.a. The Board and those acting on its behalf shall not discriminate in any way against any employee on the basis of his participation or nonparticipation in the strike called by the Racine Education Association in September, 1972. In exchange, the Racine Education Association and all teachers agree that they shall not discriminate in any way against the Board and those acting on its behalf or against other teachers, substitutes, teachers' aides, secretaries, building service department employees, or any other employees as a result of their participation or nonparticipation in said strike."

b. As of the date both parties ratify this Agreement, it is further agreed that:

The terms of the Agreement shall constitute the sole recompilation or discrimination to the extent any exists.

To the extent the parties have recompilated or discriminated on the basis of participation or nonparticipation in the strike, then such recompilation or discrimination shall be stopped.

3. The parties have resolved their differences and will get on with the business of educating students.

2. That the Conclusions of Law be amended to include the following:

"6. That the Complainant's claim that the Respondent engaged in prohibited practices by refusing to bargain collectively in violation of the Municipal Employment Relations Act, is based on existing facts and involves a real controversy over rights which may presently be asserted, and therefore said claim is not moot."

Further, the Wisconsin Employment Relations Commission adopts the remaining portion of the Examiner's Findings of Fact, Conclusions of Law, as well as the Examiner's Order with Accompanying Memorandum, and therefore the Respondent, Unified School District No. 1 of Racine County, Wisconsin shall notify the Wisconsin Employment Relations Commission within ten (10) days of the receipt of a copy of this Order as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of April, 1974

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slayman, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman, Commissioner

UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DIVISION NO. 111.70-3-D

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND  
AFFIRMING EXAMINER'S ORDER

THE EXAMINER'S DECISION

The Examiner found the Respondent, during negotiations with Complainant with respect to a bargaining agreement to cover wages, hours and working conditions covering teachers, commencing in the fall of 1972, committed the following prohibited practices:

4. That, by unilaterally establishing a new grievance procedure which, inter alia, more narrowly defined those claims which could be grieved under said procedure and eliminated the provision providing for binding arbitration, the Employer failed and refused to bargain collectively with regard to a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Wisconsin Statutes and committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the Wisconsin Statutes.

5. That to the extent the Respondent's Board of Education intended to unilaterally change or eliminate and did unilaterally change and eliminate any other working conditions established in the collective bargaining agreement which expired on August 25, 1972 which were not in issue in the negotiations by its action of adopting the resolution set out above at its special meeting on August 28, 1972, it failed and refused to bargain collectively with regard to mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Wisconsin Statutes and committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the Wisconsin Statutes.

To remedy such violative activity, the Examiner ordered the Respondent among other things to:

1. Cease and desist from refusing to bargain collectively with regard to mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Wisconsin Statutes by unilaterally establishing, modifying or eliminating wages, hours or working conditions or threatening to do so without first offering to bargain and, if requested, bargaining in good faith with appropriate representatives of the Racine Education Association with regard to any such proposed establishment, modification or elimination of wages, hours or working conditions.

The Examiner also ordered the Respondent to post the following notice to employees:

"APPENDIX A"

NOTICE TO ALL TEACHING PERSONNEL  
REPRESENTED BY THE RACINE EDUCATION ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the Racine Education Association by unilaterally establishing, modifying or eliminating wages, hours or working conditions without

Negotiations were held in good faith with the appropriate representative of the education association with regard to the proposed establishment, modification or elimination of wages, hours or working conditions.

BOARD OF EDUCATION, UNIFIED SCHOOL DISTRICT  
NO. 1 OF RACINE COUNTY

By \_\_\_\_\_  
President

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 197\_\_\_\_

THIS NOTICE MUST REMAIN POSTED THROUGHOUT THE NEGOTIATIONS CURRENTLY IN PROGRESS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL."

Respondent's Petition for Review

In its petition for review, the Respondent contends that (1) the above noted Conclusions of Law by the Examiner raise "a substantial question of law or administrative policy; (2) the nature of the above noted cease and desist order also raises a substantial question of administrative policy, specifically as to whether such portion of the Order will effectuate the policies of the Municipal Employment Relations Act (MERA); and (3) the Examiner, in his Findings of Fact, specifically paragraphs 9, 10 and 11: 1

The Examiner's findings in said paragraphs were as follows:

"9. That the resolution of the Respondent's School Board adopted at its special meeting on August 28, 1972, established wages, hours and working conditions for employees represented by the Complainant which were generally consistent with the wages, hours and working conditions contained in the collective bargaining agreement which expired on August 25, 1972, but that numerous working conditions contained in said collective bargaining agreement, which were not in issue in the negotiations, were not included in said resolution.

"10. That the resolution of the Respondent's School Board adopted at its September 11, 1972 meeting, established a grievance procedure that was different than the grievance procedure contained in the collective bargaining agreement which expired on August 25, 1972 in at least two material respects, to wit: it more narrowly defined the type of claims that could be grieved and it did not provide for binding arbitration.

"11. That subsequently, on or about November 13, 1972, the Complainant and Respondent entered into a new collective bargaining agreement which was retroactive in its application to July 25, 1972 and contained the same grievance procedure and grievance time provision as was contained in the prior collective bargaining agreement and included all those working conditions which were contained in the prior collective bargaining agreement but were omitted from the resolution adopted by the Respondent's Board of Education on September 11, 1972.

The Examiner failed to give proper weight to evidence showing that the parties had reached an impasse before Respondent took the action referred to, to the effect that the action taken did not, in fact, adversely affect any employees' wages, hours, or conditions of employment and that the Complainant and Respondent successfully negotiated the items in contention and reduced them to a written labor agreement.

POSITION OF THE RESPONDENT:

In its brief supporting its petition for review, the Respondent, in addition to incorporating, by reference its brief submitted to the Examiner,<sup>2/</sup> contends that the Examiner failed to address "some of the significant issues involved." Furthermore, in its brief filed with the Commission, the Respondent, for the first time, contended in light of Section 120.71(2) and Article X Section 3 of the Wisconsin Constitution, as well as decisions of our Supreme Court in Muskego - Norway Consolidated Schools v. WERB <sup>3/</sup>, Madison Joint School District No. 8 v. WERB <sup>4/</sup>, and Ashland Board of Education v. WERC <sup>5/</sup>, as well as other cases dealing with the delegation of powers of municipalities, that there is a conflict between the provisions of the Municipal Employment Relations Act and the education statutes, and therefore, the Respondent suggests that "the rule emerges try to resolve the conflict; but if you can't, then favor the education statutes. This rule is consistent with the constitutional mandate of education."

The Respondent contends that the provisions of MERA are incompatible with Section 120.71(2) Wisconsin Statutes, and "the only way they can be harmonized is to give precedence to the constitutional mandate" expressed in the latter statutory provision. The Respondent further argues:

"Authority to operate schools, compensate teachers, maintain insurance policies, and so forth, expired with the expiration of the labor agreement. The 1971-72 school year was over in June. The 1972-73 school year was about to start in late August. Faced with the factual context of this litigation, the school district chose one of several obvious options. For example, it could have done nothing, which would mean schools would not open and teachers would not work since all authority to employ teachers expired with the labor agreement. It could have—as it did the previous year—adopted as School Board policy the expired labor agreement with the exception of the items involved in the impasse. Either the School District or the Union could have initiated efforts to extend the duration of the old agreement (although past experience indicated this could be an impossibility). The School District could have put into effect its final offer. Instead, the School District initiated an interim personnel policy and otherwise maintained the status quo. Given these alternatives, can it be

In said brief, the Respondent contended that it committed no prohibited practices by establishing the interim personnel policies set forth in the Examiner's Findings of Fact, and further that the matters complained of were moot, since the parties had reached a succeeding collective bargaining agreement.

55 WIS 2D 40 (6/67)

55 WIS 2D 483 (12/67)

55 WIS 2D 628 (1/71)

said that the School District acted unreasonably in carrying out its statutory function under section 121.71(2) Stats.? The answer is no. Like that of any other governmental body, the discretion of the School Board deserves great respect.

The rule from the Ashland case is that the school statutes and employee relations statutes must be harmonized if possible, with close cases being called in favor of the school statutes. That rule should be applied here, under the facts of this case.

Respondent wants to see good municipal labor relations law develop. A ruling that the School District did not violate section 111.70 Stats. should not be taken to stand for any principles beyond the facts of this case. (If there were any evidence that the School District used the interim personnel policy for bargaining purposes or to frustrate the bargaining process, then Respondent should not prevail, because that kind of behavior would not help the bargaining power. But there is no evidence showing that, and that is not the case.)

The Respondent then contends that the controversy was moot since the parties have entered into a collective bargaining agreement covering the matter involved, and further that the cease and desist order of the Examiner noted above is too broad and that the Commission should revise same to read as follows:

"In the event that the existing 1972-74 Professional Agreement between the Board of Education and the Racine Education Association expires before a successor agreement is negotiated, we will not unilaterally establish, modify, or eliminate wages, hours or conditions of employment without first offering to bargain and, if requested, bargaining in good faith with the appropriate (sic) representative of the Racine Education Association with respect to the proposed establishment, modification or elimination of wages, hours or conditions of employment."

The Respondent also requests that the Commission not require the Respondent to post notices to employees, with respect to the prohibited practices, as required in the Examiner's Order.

#### THE COMPLAINANT'S POSITION:

The Complainant filed an extensive brief, citing evidence adduced during the hearing which, in the Complainant's view, amply supports the Examiner's decision, and the Complainant urges the Commission to affirm the Examiner's decision.

#### DISCUSSION:

The Commission agrees that in applying the provisions of MERA, it must attempt to harmonize said provisions with the State Constitution and the statutes relating to school districts and other municipalities and that any conflict should be reconciled if possible. Our Supreme Court has so held.<sup>6/</sup> MERA does not conflict with Article X, Section 3 of the Constitution.<sup>7/</sup> However, we reject the Respondent's contention that when MERA cannot be harmonized with school statutes that the latter govern. In the latest Supreme Court decision involving the "conflict" between MERA and school statutes, Richards v. Board of Education,<sup>7/</sup> on a notice

6/ Muskego - Norway et al v. WERS "supra".

7/ 58 Wis. 2d 444, at 460a.

for rehearing, the Court issued a per curiam decision, wherein it stated the following material to the instant issue:

"Prior to 1971, municipal employer did not have to bargain collectively with employee unions. La Crosse County Institution Employers v. WERC (1971), 52 Wis. 2d 295, 190 N.W. 2d 204. However, Sec. 111.70(1)(d), Stats. was created by Sec. 2, Laws of 1971.

In material part, Sec. 111.70(1)(d), Stats. provides:

"'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such agreements." (emphasis added)

Under the act, a school district is considered to be a 'municipal employer,' Sec. 111.70(1)(a), Stats. and this court has no difficulty in concluding that a grievance procedure established by a collective bargaining agreement, and relating to dismissals falls within the embrace of 'wages, hours and conditions of employment,' and that the conditions of such an agreement are binding on the parties. See our opinion in Local 4226 v. Rhinelander (1967), 35 Wis. 2d 209."

Thus, it is quite apparent to the Commission that the provisions of MERA are not subservient to the general school statutes, at least where wages, hours and working conditions of employes are concerned. Furthermore, we do not view the statutory duty to bargain as constituting a delegation of a school board's responsibility and authority to manage and operate a school system. Section 111.70(d) in defining the term "collective bargaining" in part states:

"The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession."

As to unilateral action of the Respondent, we are satisfied that the record supports the Findings of Fact and the Conclusions of Law of the Examiner. Furthermore, we are not satisfied that the Respondent found it necessary to take such unilateral action in order to exercise its authority to manage and operate its schools. Contrary to the argument of Respondent, we do not agree that such authority expired with the expiration of the collective bargaining agreement. The Respondent, in its brief to the Commission set forth various alternatives it could have taken other than unilaterally implementing the changes involved. There still existed additional alternatives, including to maintain the full status quo, which would include the personnel policy of the agreement which had expired. Such an action would not have been violative of the Respondent's duty to bargain.

The Respondent also contends that the matter is moot since "the entire subject matter of the complaint and litigation was collectively bargained and was incorporated into the successor labor agreement," which was retroactive to August 25, 1972. The Respondent raised this defense in its answer to the complaint and in its brief to the Examiner. The Examiner made no determination with regard to said defense, nor discussed same in his Memorandum. Nevertheless, the Commission deems it necessary to do so, and it has revised paragraph 11 of the Findings of

B/ See first paragraph of that portion of Respondent's brief cited on page 5 hereof.

Facts to correct a date therein and to include the pertinent language in the 1972 collective bargaining agreement which the Respondent relies upon in support of its contention that the matter was "settled" in said agreement. The Commission has also revised the Examiner's Conclusions of Law so as to determine the issue of mootness.

In reviewing the contractual provisions relied upon by the Respondent (as reflected in revised paragraph 11 of the Findings of Fact) the Commission cannot agree that the language therein in any way indicates that the matters involved in the instant complaint were "resolved". The contractual declaration that "the parties have resolved their differences" does not, in our view, reflect a clear intent that the instant complaint would be dismissed. Rather, in context, it seems to address the matters in dispute in the negotiations. We also note that this "defense" was not raised in the answer.

We do not agree that the matter is moot. The Wisconsin Supreme Court has defined a moot case as:

"...one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy." 9

The activity in question violates the public policy of Wisconsin as expressed in MERA and the Complainant has a legal right to ask that the Respondent be directed to cease engaging in that activity and take such affirmative action as might be appropriate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not merely seeking a "decision in advance" since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".

Even though the activity complained of has ceased, the terms of the current collective bargaining agreement is subject to renegotiation beginning in January, 1974 and the agreement can be terminated by either party as early as August 25, 1974. If the Commission were to dismiss the case as moot at this point in time, the Respondent could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in MERA and would have the "practical legal effect" of leaving the Complainant without an effective remedy.

The Wisconsin Supreme Court has specifically recognized that a case, that might be said to be moot by reason of the fact that the unfair labor practice complained of has ceased, is not moot, if it can be said that interests of a public character are asserted under conditions that may be

9/ WERS v. Allis Chalmers Workers Union Local 248, UAW-CIO, 252 Wis. 436 (1948).

immediately repeated. <sup>10</sup> This case clearly falls within the rule of that case and the Commission has asserted its jurisdiction to make a determination in the matter. <sup>11</sup>

With respect to the Respondent's exception to the Examiner's broad cease and desist order, we deny the exception. To limit the order to a specific type of a failure to bargain collectively would not, in our opinion, effectuate the policies of MERA. Likewise, we accept the Examiner's Notice To Employees for the same reason. The fact that the issues may be technical and complex, as argued by the Respondent, does not constitute a basis for revising the Notice, or that it not be posted.

In closing, the Respondent argues that:

"The Employer should not be prejudiced because its interpretation of its statutory duty runs afoul of the Commission's interpretation, particularly where the evidence fails to show that any employee or the Union was adversely affected by the School District's action."

This argument has no merit. The Respondent's interpretation and activity ran afoul of its duty to bargain collectively with the Complainant, and adversely affected the exclusive bargaining status of the Complainant.

Dated at Madison, Wisconsin this 19th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Glavney*  
Morris Glavney, Chairman

*Zel S. Rice Jr.*  
Zel S. Rice Jr., Commissioner

*Howard Bellman*  
Howard S. Bellman, Commissioner

<sup>10</sup> Ibid. at p. 441.

<sup>11</sup> Kearney & Trecker Corp. (11083-A-B) 4/73.